the greater number fail for the reason that the objectionable matter was pertinent and relevant. This data does not aid us much, for while we have seen the possible justification of asserting the individual right, we have no means of estimating the probable injury and inconvenience wrought by the new rule. Whether or not the rights of witnesses, counsel and parties are in any manner molested by toleration of the new rule is a matter of speculation. But if the frequency of litigation can be regarded as an indication of the evil effects on the public, then the injury must indeed be great; for in those jurisdictions entertaining the new doctrine, reported cases on privileged communications in judicial proceedings are numerous, to say nothing of those that fail to reach the higher courts; while in jurisdictions following the English rule, one or two reported cases usually settle the matter. If England, in the beginning, followed the present American rule, as some authorities insist, then the evil results of that rule have been discovered, for in *Munster* v. *Lamb*, *supra*, the question is put at rest in no uncertain language; but as shown a critical examination of the English rule from *Beauchamps* v. *Croft* (1569) to *Munster* v. *Lamb* (1883), will show a continuous refusal to entertain such actions, with now and then hints as to the necessity of the matter being pertinent and relevant.

The so-called American doctrine, founded as it is in supposed English precedent, seems really to be nothing more nor less than the result of misinterpretation.

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WHEN RIGHTS IN PERSONAM GIVE RISE TO RIGHTS IN REM.

The third grand division of rights, according to Mr. Holland, is rights *in personam* and rights *in rem*, or rights of a definite, and of an indefinite kind.[1]

Rights *in personam* and rights *in rem* have been defined as, respectively, contract right, and tort right. Then it would seem to follow that rights *in personam* give rise to rights *in rem* so far as "torts are founded on contract." For instance, when a plaintiff has a contract with a definite person, say a physician for skillful attention, this would

[1] Holland's Jurisprudence, 107.

be contract, or *in personam*, right, but any infringement of this right, as by lack of diligence, or by carelessness, would give rise to a tort or *in rem* right.[1] Or, as tersely stated by Mr. Bigelow, "A, who has contracted with B for the performance of an act, owes to B the duty not to omit, to the damage of B, to exercise such care, skill or dilgence in the performance thereof as a prudent or skillful man, of the same business, would exercise in the same situation." [2] This will apply to contracts between principals and agents.[3]

It is not necessary to prove fraud,[4] but the agent or factor is required to act with proper care and prudence, exercising judgment after enquiries and precaution, with good faith.[5]

It will also apply to servants,[6] trustees,[7] executors,[8] administrators,[9] directors of corporations,[10] public officers transacting business for private parties,[11] officers and agents of the general government, and officers of the court.[12]

An inn-keeper is required to protect one's property against damage or loss while in his care, and if by his negligence or lack of diligence, any harm comes to the property, except by an inevitable accident, he is liable to an action.[13]

A right *in rem* arises against a common carrier for breach of contract to carry the plaintiff, or his goods, safely to a designated place, provided he is not prevented or hindered in any way by the plaintiff.[14]

Attorneys-at-law are required to be diligent, skillful, and to use care in their relations with their clients. For example, the defendant, an attorney, is employed to take statutory proceedings on behalf of the plaintiffs against their apprentices for misconduct. The defendant proceeds upon a section of the statute relating to servants and not to apprentices. This is deemed such a want of skill or diligence as to render the defendant liable to the plaintiff for damages and costs incurred by his mistake.[15] Also physicians, surgeons, and other profes-

1 Holland's Jurisprudence, 190; Bigelow on Torts, 325.
2 *Id.* 326.
3 *Lee* v. *Hill*, 87 Va. 499.
4 *Leverick* v. *Meigs*, 1 Cow. 645.
5 *Wood* v. *Cooper*, 2 Heisk. 441.
6 *Walker* v. *Guarantee Company*, 18 Q. B. D. 277.
7 *Harvard College* v. *Amory*, 9 Pick. 446.
8 *Johnson's Estate*, 9 W. & S. 107.
9 *Percy* v. *Millandon*, 20 Mart. (La.) 68.
10 *Haynes* v. *Porter*, 22 Maine, 371.
11 *Browning* v. *Hanford*, 5 Hill, 588 (N. Y.)
12 *Moore* v. *Westewelt*, 27 N. Y. 334.
13 *Rockmell* v. *Proctor*, 39 Ga. 105; *Houser* v. *Tully*, 62 Pa. St. 92.
14 Schouler, Bailments & Carriers, 558, *et seq.*
15 *Hart* v. *Frame*, 6 Clarke & F. 193.

sional men, are liable in tort for breach of contract caused by their negligence.[1]

Mr. Justice Woodward in a Pennsylvania case, following the English decisions, says: "Though telegraph companies are not, like common carriers, insurers for the safe delivery of what is entrusted to them, their obligations as far as they reach, spring from the same sources—the nature of their employment and the contract under which the particular duty is assumed. One of the plainest of their obligations is to transmit the very message prescribed. To follow copy, an imperative law of the printing office, is equally applicable to the telegraph office."

Again: "It is settled that incorporated companies may be sued for damages arising from their neglect of duty (8 Am. Dec. 675; 3 Peters, 409). And a corporation is liable, to a party who has contracted with it, in tort for the tortious act of its agent, though the appointment be not under seal, if the act be done in the ordinary service."[2]

The American cases as a rule hold that the telegraph companies are liable, under the contract, to the receiver, and Dr. Pollock, in discussing the difference between the American and English decisions, agrees that on principle that the ruling of our courts is preferable to that of the English.[3]

Bailees are required only to use "ordinary care" to avoid being liable to an action for loss or damage to property entrusted to them. For example, the defendants, warehousemen for hire, lose by theft the plaintiff's property while the same is in their custody. If they have exercised the same degree of care that is usually exercised in that vicinity by other warehousemen, defendants are not liable.[4]

A breach of contract does not give rise to the tort right unless there is negligence, the probable and natural result of which causes damage. The contract, with its incidents either expressed or attached by law, becomes the only measure of the duties between the parties. There might be a choice, therefore, between the forms of pleading, but the plaintiff could not by any device of form get more than was contained in the defendant's obligation under the contract.

[1] *Wood* v. *Clapp*, 4 Sneed, 65; *Hibbard* v. *Thompson*, 109 Mass. 288; *Gill* v. *Middleton*, 105 Mass. 479.

[2] *New York &c. Telegraph Co.* v. *Drybury*, 35 Pa. St. 298.

[3] Pollock on Torts, 458.

[4] *Cass* v. *Boston &c. R. Co.*, 14 Allen 448; *Lane* v. *Boston &c. R. Co.*, 112 Mass. 455; *Briggs* v. *Taylor*, 28 Vt. 180.

Thus an infant could not be made chargeable for what was in substance a breach of contract by being sued in an action on the case.

There is another phase of the question, and that is this: Is a third person liable, in an action on the case, to an injured contractor for causing the co-contractor to break the contract?

It is conceded by all that one may without malice simply persuade or procure another to break his contract with a third party and not be liable, but if threats, fraud, deceit, libel, or slander, are used in causing the breach, the inducer will be liable to the damaged contractor.[1] But the point of divergence of opinion is the question whether an action will lie against one who, from malicious motives, but without threats, violence, fraud, falsehood, or deception, induces another to violate his contract with another.

The leading case is *Lumley* v. *Gye*,[2] in which the plaintiff had engaged Miss Wagner to sing for a certain period at his theatre. Defendant, knowing the premises, maliciously procured Miss Wagner to break her contract by refusing to sing. The majority opinion held that the relation of master and servant existed, and under the Statute 23 Edward III, the defendant was liable, but the Justice (Crompton) said, however, that "He did not wish to be considered as deciding, or saying, that in no case, except that of master and servant, is an action maintainable for maliciously inducing another to break a contract, to the injury of the person with whom such contract has been made." Justice Coleridge (afterwards made Lord Chief Justice of England), in a long and able opinion, dissented, holding that the relation of master and servant did not exist, and saying: "Merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another, is not actionable."

Bowen v. *Hall*[3] is similar to *Lumley* v. *Gye*, except that the party breaking the contract was a skilled mechanic instead of an operatic singer.

Rice v. *Manley*[4] was a case where the defendant induced the breach by sending a false telegram, therefore was liable for deception.

In *Benton* v. *Pratt*[5] the contract was broken because of defendant's false representation that plaintiff had abandoned all intention of fulfilling it. Defamatory statements were the grounds on which recovery was allowed in *Lally* v. *Cantwell*.[6]

[1] *Boyson* v. *Thorn*, 98 Cal. 598 (1893) reviewing and citing the cases.
[2] 2 El. & Bl. 216 (1853).
[3] 6 Q. B. D. 333 Law R. (1881).
[4] 66 N. Y. 82 (23 Am. Rep. 30).
[5] 2 Wend. 385 (20 Am. Rep. 623).
[6] 30 Mo. App. 524.

Jones v. *Stanley*[1] is a case allowing damages only because the defendant's motive was malicious, but the decision was based on *Hankins* v. *Royster*[2] (the only case cited), which case involved the relation of master and servant, and was decided by a divided court.

In *Tasker* v. *Stanley*[3] the action was for procuring and enticing the plaintiff's wife to live separately from him. There was no evidence that the defendant spoke any falsehood, or that his conduct was unlawful for any other reason than its tending to produce a separation. "In order to make a man, who has no special influence or authority, answerable for mere advice of this kind because it is followed, we think it ought to appear that the advice was not honestly given, that it did not represent his real opinion, or that it was given from malevolent motives; and so are all the cases." Here the rule of *per quod consortium amisit* should govern.

In the recent case of *Beck* v. *Railway Travelers Protective Union*[4] the defendants were endeavoring by threats, libels and a boycott to force the plaintiffs to break their contract with certain third parties, and because of the libel (and for other reasons) the court held that the defendants should be enjoined.

Boulier v. *Macauley*[5] is a stronger case than *Lumley* v. *Gye*, as the dramatic performer was not only induced to violate his agreement with the plaintiff, but also to preform in defendant's theatre instead. It was held that the defendant was not liable.

Another Kentucky case, decided at the same term, *Chalmers* v. *Baldwin*,[6] was for procuring a third party to break his contract for the sale of a crop of tobacco.

The questions presented in the latter case, as stated by the court, are:

"1. Whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it?

"2. Whether an act lawful in itself can become actionable solely because it was done maliciously."

The judgment of the court below sustaining the demurrer was affirmed. The opinion is quite strong and convincing.

It was held in *Payne* v. *Railroad Company*[7] that the defendant was

[1] 76 N. C. 555.
[2] 70 N. C. 610 (16 Am. Rep. 780).
[3] 153 Mass. 148.
[4] 77 N. W. 13 (1898).
[5] 15 S. W. 60 (Ky.).
[6] 15 S. W. 57.
[7] 13 Lea, 507 (Tenn.), 49 Am. Rep. 666.

not liable although it had given notice that any employers who, after that date, traded with the plaintiff would be discharged. It was also held that an act not unlawful, though from wicked and malicious motives, as the motive was, and causing injury, is not actionable.

Boyson v. *Thorn*,[1] a case in which the decisions are reviewed, holds that malicious motives cannot make a lawful act unlawful. In a note to it is cited *Bohn Manufacturing Company* v. *Hollis*,[2] accord., and *Jackson* v. *Stanfield*,[3] contra.

From the digest of the late English case of *Allen* v. *Flood*, decided by the House of Lords, it seems that the respondents were employed "by the job" and could be discharged at the end of any day's work. The appellant, who was a delegate of a labor union, threatened to call out all the union men unless their employers discharged the respondents. The carrying out of the threat would have stopped the employers' business, therefore they discharged the respondents.

Held, reversing the Court of Appeal, that the appellant had violated no legal right of the respondents, done no unlawful act, and used no unlawful means, in procuring the respondents' dismissal ; and that his conduct was not actionable, however malicious or bad his motives might be. And held further, that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act, so as to make a doer of the act liable to a civil action.

The law is stated by Judge Cooley[4] as follows: "An action cannot, in general, be maintained for inducing a third party to break his contract with the plaintiff, the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." And again : "Bad motive by itself is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own ensence is lawful."[5]

It is a truism of the law that an act which does not amount to a legal injury, cannot be actionable because it is done with a bad intent. What one has a right to do, another cannot complain of. It is admitted that actual damage must be proved. This at once shows that the right, if any, violated, is not an absolute and independent one, like a right of property, for the possibility of a judgment for nominal damages is in our law the touchstone of such rights.

If malice is made the criterion, how is it to be shown? It cannot

[1] 98 Cal. 578 (1893).
[2] 55 N. W. 1119 (Minn.).
[3] 36 N. E. 345 (Ind. 1894).
[4] Cooley on Torts, 499.
[5] Id. 832.

be presumed, or implied, on a certain statement of facts, for this would hamper all competition. For instance, A secures an able employe of his rival B, to leave B and work for A. Is malice or merely a spirit of rivalry, to be implied? How could the court say whether or not A was prompted by a bad motive to injure B, or an honest desire to obtain the most competent corps of employes? It would be impossible to prove his motive. If malice cannot be implied in certain acts without retarding competition, and a certain spirit of rivalry, which are the life and vigor of every business transaction, and vexatiously, and unnecessarily incurring litigation, why should not the law say to a man: "Provided your act is lawful, the law will not inquire what your motive is"; or "If you wish to cause some one to break his contract, the law will not hold you liable, even though you are actuated by malice, provided your act unaccompanied by malice would be lawful." A different rule would make all business men uneasy whenever they desired to employ a competent assistant already engaged by another; would deter merchants from advertising that they will pay certain prices for certain articles, for fear a present vendor of a rival would be thereby induced to break his contract in order to accept the terms of the advertisement; and I may say, for the benefit of the unmarried lawyers, if a young man should win one of the fairer sex from her betrothed, that fortunate young fellow would be liable in a suit for causing a breach of promise.

Malice in such cases might be implied, as in the case of defamatory words, and, similarly, put the burden on the defense of proving its absence. But the evil of thus encouraging the vexatious claims of the unfortunate contractor would far exceed that created by allowing a certain amount of enmity, engendered by a spirit of rivalry, to go unpunished. As Lord Wensleydale thought, expediency should be the policy of the law.

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